Supreme Court, U.S.
FILED
AUG 22 2003
OFFICE OF THE CLERK

No. 02-1709

IN THE
SUPREME COURT OF THE UNITED STATES

NICHOLAS LASSONDE,
*Petitioner,*

*v.*

PLEASANTON UNIFIED SCHOOL DISTRICT, ET AL.,
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

# REPLY TO BRIEF IN OPPOSITION

Steven N. H. Wood
*Counsel of Record*
STODDARD, BERGQUIST
WOOD & ANDERSON, LLP
1470 Maria Lane
Suite 300
Walnut Creek, CA 94596
Tel.: (925) 938-6100

John W. Whitehead
Steven H. Aden
Rita M. Dunaway
M. Casey Mattox
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
Tel.: (434) 978-3888

*Counsel for Petitioner*

August 21, 2003

## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

REPLY TO BRIEF IN OPPOSITION ..... 1

I. PETITIONER MAINTAINED "PRIMARY CONTROL" OVER HIS SPEECH WITHIN THE MEANING OF THE DEPARTMENT OF EDUCATION GUIDELINES DESPITE RESPONDENTS' PRIOR REVIEW OF THE SPEECH ..... 1

II. THE DEPARTMENT OF EDUCATION'S GUIDANCE PROTECTS A RANGE OF RELIGIOUS SPEECH WHICH INCLUDES BUT IS NOT LIMITED TO FORMAL PRAYER ..... 3

III. THE SPLIT BETWEEN THE CIRCUITS IS CLEAR AND WARRANTS SUPREME COURT REVIEW ..... 4

IV. A STUDENT GRADUATION SPEECH IS NOT A COLLECTIVE EXERCISE ELICITING AUDIENCE PARTICIPATION, AND THEREFORE COERCION ANALYSIS IS INAPPOSITE ..... 8

V. RESPONDENTS' AND THE NINTH CIRCUIT'S INSISTENCE THAT PETITIONER'S SPEECH WAS "SECTARIAN" AND "PROSELYTIZING" IS BY ITS VERY NATURE CONTENT-DISCRIMINATORY AND CONTRAVENES THE COURT'S CLEAR PRECEDENT ..... 9

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

### CASES

*Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) ..... 4-7

*Bethel v. Fraser*, 478 U.S. 675 (1986) ..... 1, 2

*Cantwell v. Connecticut*, 310 U.S. 296 (1940) ..... 10

*Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), *cert. den.*, 533 U.S. 916 (2001) ..... 7

*Cole v. Oroville Union High Sch.*, 228 F.3d 1092 (9th Cir. 2000) ..... 4, 6-8

*Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) ..... 10

*Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) ..... 10

*Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003) ..... 5-8

*Lee v. Weisman*, 505 U.S. 577 (1992) ..... 8, 9

*Lemon v. Kurtzman*, 403 U.S. 602 (1971) ..... 10

*Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) ..... 9, 10

*Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) ..... 3, 10

*Widmar v. Vincent*, 454 U.S. 263 (1981) ..... 10

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

No Child Left Behind Act, 20 U.S.C. § 7904(a) ..... 1-4

United States Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools,* February 7, 2003 ..... 1-4

UNITED STATES CONST., AMEND. I ..... 1, 9, 10

UNITED STATES CONST., AMEND. XIV ..... 6, 7, 10

## REPLY TO BRIEF IN OPPOSITION

### I. PETITIONER MAINTAINED "PRIMARY CONTROL" OVER HIS SPEECH WITHIN THE MEANING OF THE DEPARTMENT OF EDUCATION GUIDELINES DESPITE RESPONDENTS' PRIOR REVIEW OF THE SPEECH.

In countering Petitioner's argument that the Ninth Circuit Court of Appeals' holding places school districts between the pincers of potential liability for violating the Establishment Clause on the one hand and revocation of federal funding under the No Child Left Behind Act (20 U.S.C. § 7904(a)) on the other, Respondents suggest that their behavior does not contravene the Act because at all times they maintained "primary control" of Petitioner's speech within the meaning of the Department of Education Guidance.[1] Yet this interpretation of "primary control" would undermine the rationale of the Act and the regulations promulgated thereunder, and is contrary to the ordinary and accepted meaning of the word "primary" in everyday language.

If Respondents preserved "primary control" over the speech merely by requesting to review it prior to the graduation ceremony in order to exercise their constitutionally permissible authority over profane content , *see Bethel v. Fraser*, 478 U.S. 675, 686 (1986) (holding that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech... would undermine the school's basic educational mission"), then it follows that a student may retain "primary control" of his speech only when his school adopts a comprehensively permissive attitude toward his speech and does not review its content prior to delivery. But the Department's Guidance explicitly contemplates a situation in which a student retains "primary control" of his speech and a school restricts its religious content:

---

[1] - Respondents' Brief in Opposition, at 2.

> [W]here students or other private graduation speakers are selected on the basis of neutral, evenhanded criteria and retain primary control over the content of their expression... that expression... may not be restricted because of its religious (or anti-religious) content.

*Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools,* February 7, 2003, Appendix to Petition ("App.") at J6.

Moreover, the Guidelines expressly repudiate Respondents' strained interpretation of "primary control." The Department observes that "local school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities...." *Guidance on Constitutionally Protected Prayer*, App. at J6.

> For example, the First Amendment permits public school officials to review student speeches for vulgarity, lewdness, or sexually explicit language. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683-86 (1986). *Without more, however, such review does not make student speech attributable to the state.*

*Id.*, at n.13, App. J12-J13 (emphasis added). Even when exercising such discretion, the DOE cautions, school authorities "may not structure or administer such rules to discriminate against student prayer *or religious speech*." *Id.* (emphasis added).

Under Respondents' interpretation of "primary control," a student could not retain "primary control" over his speech and at the same time subject its content to school review and potential restriction. Respondents' definition of "primary control" plays both sides of the fence, making the conditions of "primary control" and "school review" mutually exclusive when the Act clearly does not mandate this reading. Petitioners respectfully submit that the concept of "primary control" must be understood not as exhaustive control but as rhetorical license subject to legitimate review.

The ordinary meaning of the word "primary" reinforces this definition, since the word "primary" naturally contemplates the existence of something "secondary" to it. "Primary control," therefore, cannot mean "exhaustive control." Respondents' policy cannot be reasonably interpreted as "primary" and Petitioner's work "secondary," when Respondents merely required that Petitioner eschew the use of profanity and that he submit the speech for review prior to delivery, ostensibly to ensure that Respondents' single explicit directive had been followed. Petitioner conceived a concept for the speech, outlined its rhetorical structure, wrote and revised it, and prepared to deliver it at his graduation ceremony. Petitioner's control over the speech from beginning to end clearly supervened in importance and responsibility over Respondents' right of review. The latter was merely a formality; the former was an act of literary creation.[2] Accordingly, it cannot be said that in any sense Respondents retained "primary control" over the theme or content of Petitioner's speech.

## II. THE DEPARTMENT OF EDUCATION'S GUIDANCE PROTECTS A RANGE OF RELIGIOUS SPEECH WHICH INCLUDES BUT IS NOT LIMITED TO FORMAL PRAYER.

Respondents assert that Petitioner's graduation speech "has nothing to do with constitutionally protected prayer," and draws from this statement the conclusion that Petitioner's speech is not protected by the No Child Left Behind Act. Even a cursory review of the Guidance, however, reveals that the text of the Guidance

---

[2] Moreover, Respondents should not be permitted to censor private religious speech under the guise of exerting control over the student graduation speeches. *Cf. Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) ("petitioners' fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students").

draws its purview substantially broader:

> [T]he *speech* of students who choose to express themselves through religious means *such as prayer* is not attributable to the state and therefore may not be restricted because of its religious content. Student *remarks* are not attributable to the state simply because they are delivered in a public setting or to a public audience.

*Guidance on Constitutionally Protected Prayer*, App. at J6 (emphasis added). Obviously, "speech" and "remarks" are not "prayer." Moreover, a footnote to this portion of the Guidance specifically deals with the constitutional implications of prayer as an "additional" form of religious expression. *Id.*, n.14, App. at J13. Certainly, if the Act had only contemplated prayer, its drafters would have used that term instead of "speech" and would not have conveyed protection to "nonreligious" and "anti-religious" expression, since the notion of "anti-religious" prayer is an absurdity. Thus, Petitioner's religious speech clearly falls within the ambit of the Act, and Respondents' restriction of that speech exposes them to liability for the range of sanctions available to the Department of Education.

## III. The Split Between the Circuits Is Clear And Warrants Supreme Court Review.

Respondents' attempt to reconcile *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) with the instant case and its progenitor, *Cole v. Oroville Union High Sch.*, 228 F.3d 1092 (9th Cir. 2000), turns on the incorrect assertion that the *Adler* policy limited student speech to "non-sectarian" and "non-proselytizing" speech. As the Eleventh Circuit noted time and again, the Duval County policy under review in *Adler* was facially neutral with regard to religion. 250 F.3d at 1331, 1334, 1337. Graduating seniors were permitted to vote whether or not a member of their class should give a "message" before or after graduation and, if so, what student to select for the task. 250 F.3d at 1332. The policy did not limit student speech to "non-sectarian" or

"non-proselytizing" content; it made absolutely no mention of such strictures. *Id.* Nor did it mention "invocations" or "benedictions." *Id.* In fact, that the policy did not mention prayer at all is one of the essential facts upon which the Eleventh Circuit rested its conclusion that the commencement oration amounted to "private speech" and did not trigger coercion concerns:

> [T]he text setting forth the Duval County policy contains no language approving an "invocation" and no other provision that could fairly be read to require or approve a "religious" theme. [This]... demonstrate[s] why... the speech at issue here... cannot reasonably be described as state "coercion" of religion.

*Id.* at 1337-39.

Like the *Adler* policy, Respondents' general policy was facially neutral toward religion. Petitioner was selected according to a neutral, secular criterion (his grade point average) and was given a single, unremarkable guideline for the content of his speech (that it not be profane) – a guideline he unquestionably followed. Despite this initially reasonable and balanced approach, when Respondents, upon later review, elected to edit Petitioner's speech of its religious references, the Ninth Circuit upheld this straightforward act of content-based censorship, construing it as necessary to avoid an Establishment Clause violation. *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003) (quoting *Cole*, 228 F.3d at 1101).

The conflict between the Eleventh Circuit's holding in *Adler* permitting religious expression and the Ninth Circuit's holdings in *Cole* and *Lassonde* requiring censorship of religious expression is clear. On the one hand, the Eleventh Circuit upheld the *Adler* policy despite Establishment Clause challenge because (1) the student speech under review was purely private and therefore did not trigger coercion concerns, and (2) the policy did not afford room for school censorship of disfavored minority opinions. *Adler*, 250 F.3d at 1339. On the other hand, the Ninth Circuit in

*Lassonde* upheld on Establishment Clause grounds Respondents' decision to turn a neutral policy of permissiveness toward commencement speech content into an act of religious censorship because it decided that Petitioner's speech amounted to a "religious practice" and thus "compelled a dissenter's implicit participation." *Lassonde*, 320 F.3d at 984. In both cases the speech considered was written and delivered by a student selected according to neutral criteria. In both cases the schools were, at best, only nominally involved in setting boundaries for student speech content. Reviewing strikingly similar circumstances, the two Circuits came to starkly conflicting conclusions regarding the coercive effect of religious speech under those circumstances.

Respondents assert that Petitioner's speech was "sectarian" and "proselytizing" and thus should be treated differently from the student speech under review in *Adler*. Brief in Opposition, at 6, 8-9. But this distinction actually militates against Respondents' claim of harmony between *Adler* and *Lassonde*. The Eleventh Circuit was not concerned with the religious content of the speech itself, but rather with the school's official involvement in controlling that content. *Adler*, 206 F.3d at 1083-84 ("whether unconstitutional coercion exists "is largely determined by the measure of state control over the message at a graduation ceremony, rather than state control over the ceremony itself"). When, therefore, the Eleventh Circuit determined that the school was not in control of the speech, it looked no further at the speech's content and held that the school's policy did not raise coercion concerns. 206 F.3d at 1083-84; *accord Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000), *cert. den.*, 533 U.S. 916 (2001) ("Private speech endorsing religion... is not unconstitutionally coercive even though it may occur before non-believer students."). The Ninth Circuit, on the other hand, relied prominently on the "proselytizing" content of Petitioner's speech, coupled with Respondent's "plenary control over the graduation ceremony." 320 F.3d at 983-84, quoting *Cole*, 228 F.3d at 1103. This approach the Eleventh Circuit explicitly foreswore. *Adler*, 206 F.3d at 1083. Because the Ninth Circuit found Petitioner's speech to be "proselytizing," it held that coercion analysis applied to substantiate Pleasanton's decision to censor its

religious content. Thus, it is readily apparent that the two Circuits implemented fundamentally different methodological approaches to coercion analysis and came to opposite conclusions. Moreover, these conclusions have established contrary constitutional regimes for public school graduation expression. In the states comprising the Eleventh Circuit, private religious expression, whether prayer or pure speech, "proselytizing" or non-sectarian, is tolerated, and the Establishment Clause does not require a different result; in the states comprising the Ninth Circuit, private religious expression must be censored in subjection to the Establishment Clause.

In view of the above, Petitioner respectfully submits that review by this Court is necessary to resolve the split among the Circuits on the question whether the Establishment Clause requires censorship of religious content in graduation speeches where the speakers are selected according to neutral criteria and the school adopts a primarily permissive posture toward the content of the speech. Moreover, the Circuits require guidance in ascertaining the relative importance of message content and school involvement in regulating that content insofar as these factors relate to coercion analysis.

## IV. A Student Graduation Speech Is Not a Collective Exercise Eliciting Audience Participation, And Therefore Coercion Analysis Is Inapposite.

Attempting to rebut Petitioner's argument that the coercion analysis developed by the Supreme Court in *Lee v. Weisman*, 505 U.S. 577 (1992), should not obtain when considering the effect of a student's religious speech upon his audience, Respondents argue (and the Ninth Circuit contends) that collective prayer led by a school-appointed minister and religious speech by a student appointed by virtue of his grade point average are of the same piece. Brief in Opposition at 8-10. *See Lassonde*, 320 F.3d at 984 (holding that "proselytizing, no less than prayer, is a religious practice.") (*quoting Cole*, 228 F.3d at 1101). Both Respondents and the Ninth Circuit fail to grasp the fundamental difference between the two kinds of speech the difference upon which the

result in *Lee* substantially turned.

The record in *Lee* itself demonstrates that an invocation given before a group is by its very nature a collective exercise. There Rabbi Gutterman explicitly used the collective pronoun "we" to thank the "God of the Free" for an enumerated list of blessings. 505 U.S. at 581-82. The rabbi was thus not only praying on his own behalf, but was also invoking Divine blessing and guidance on behalf of the entire audience, and especially on behalf of the graduating students. This is the nature of an invocation; it presumes the accord and participation of the audience. This fact formed the core of the Court's psychological coercion test. As the Court wrote in *Lee*, "There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise." 505 U.S. at 593.

A student's speech, on the other hand, is not in any sense a collective exercise, but rather is an expression of the views and wishes of the speaker alone. As Petitioner argued in his Petition for Writ of Certiorari, "it defies logic to assume that one who remains silent while another person addresses an audience via pure speech would reasonably feel that he or she has 'participated' in the speech." Petition at 24. In their Brief in Opposition, Respondents contest Petitioner's characterization of his address as "pure speech," and instead attempt to construe it as a "proselytizing christian (sic) sermon" for the purposes of coercion analysis. Brief in Opposition, at 5. But this characterization fails to do the logical work Respondents demand of it. Even if Respondents are right in calling Petitioner's speech a sermon, a sermon is no more a collective act than is a speech. Both use words to promote ideas, but neither is a group exercise in which an audience can reasonably be said to participate in the way contemplated by this Court in *Lee*.

## V. RESPONDENTS' AND THE NINTH CIRCUIT'S INSISTENCE THAT PETITIONER'S SPEECH WAS "SECTARIAN" AND "PROSELYTIZING" IS BY ITS VERY NATURE CONTENT-DISCRIMINATORY AND

CONTRAVENES THE COURT'S CLEAR PRECEDENT.

In their "Counter Statement of Facts," Respondents assert that Petitioner's original speech was "a call to the faithful to follow [Christian] beliefs." Brief in Opposition, at 3. Elsewhere Respondents sharply denounce Petitioner's choice of language as "sermonizing" and "proselytizing" and opine that non-adherents would find it "repugnant" and "offensive." *Id.*, at 9-10. Aside from the unfortunate tone of such characterizations, Respondents (and the Ninth Circuit) fail to grasp that such viewpoint-based descriptions cannot form the basis for First Amendment analysis of religious speech. Proselytizing or non-proselytizing, sectarian or non-sectarian, private speech from a religious viewpoint is protected in all circumstances where speech of any other viewpoint is permitted, while government speech endorsing religion is not. See *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Evangelism is protected, core First Amendment speech. *See Good News Club v. Milford Central Sch.*, 533 U.S. 98, 125-26 (2001); *Rosenberger*, at 844 (referring approvingly to the dissent's description of the paper as a "work characterized by... evangelism," but noting it protected nonetheless); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). "Proselytizing" is merely a dirty word for "private speech endorsing religion," which the First Amendment clearly protects. *Mergens*, 496 U.S. 250.

Furthermore, the content-based review exercised by Respondents and upheld by the Ninth Circuit is facially offensive to the Establishment Clause, inasmuch as it requires schools and courts to engage in an extensive analysis of religious speech, which (1) necessarily entangles schools in religious matters in violation of the third prong of the *Lemon* test (see *Lemon v. Kurtzman*, 403 U.S.

602, 613 (1971)) and (2) demands that courts distinguish among different forms of religious speech, a task the Supreme Court explicitly considered suspect in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) ("to determine which words and activities fall within 'religious worship and religious teaching' could prove an impossible task....").

## CONCLUSION

For the reasons set forth hereinabove, Petitioner Nicholas Lassonde respectfully requests that the Court grant certiorari to review the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

Steven N.H. Wood
*Counsel of Record*
STODDARD, BERGQUIST,
WOOD & ANDERSON, LLP
1470 Maria Lane, Suite 300
Walnut Creek, CA 94596
Tel.: (925) 938-6100

John W. Whitehead
Steven H. Aden
Rita M. Dunaway
M. Casey Mattox
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
Tel.: (434) 978-3888

August 21, 2003